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No. 88-1896

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1988

DORSEY DUNTON, et al.,
Petitioners,

vs.

UNITED ASSOCIATION, ETC., et al.,
Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, SECOND APPELLATE DISTRICT, DIVISION SIX

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QUESTION PRESENTED

Is a state tort claim for intentional infliction of emotional distress preempted under the principles of *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236 (1959), where the evidence offered to prove the tort claim consisted of allegedly discriminatory union hiring hall practices which are subject to the primary jurisdiction of the National Labor Relations Board (NLRB)?

LIST OF PARTIES

Dorsey Dunton

Dick J. Fletcher

Gale Ward

Sidney Stolper

United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local No. 403 (affiliated with Southern California Pipe Trades District Council No. 16 of the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, and United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada).

STATUTES INVOLVED

The preemption doctrine at issue in this case is based in part upon Sections 7 and 8 of the National Labor Relations Act, 29 U.S.C. Sections 157, 158.

TABLE OF CONTENTS

	Page
Question Presented	i
List Of Parties	i
Statutes Involved	ii
I	
Statement Of The Case	1
II	
The Petition Should Be Denied Because It Fails To Present Any Issue Deserving This Court's Attention	4
A. This Case Is Squarely Within The Rule Of Farmer v. Carpenters And Other Cases Decided By This Court And Thus Presents No Cert.-Worthy Issue	4
B. The Court Of Appeal's Disposition Of This Case Does Not Create Any Potential For "Confusion"	6
III	
Conclusion	8

TABLE OF AUTHORITIES

Cases

	Page
Abreu v. Svenhard's Swedish Bakery, 208 Cal.App.3d 1446, 257 Cal.Rptr. 26 (1989)	7
Allis-Chalmers Corp. v. Lueck, 471 U.S. 202 (1985)	6, 7
Alpha Beta, Inc. v. Superior Court, 244 Cal.Rptr. 414 (1988)	7
Association of Journeymen v. Borden, 373 U.S. 690 (1963)	4-6
Belknap, Inc. v. Hale, 436 U.S. 491 (1983)	4-6
Choate v. Louisville & Nashville R. Co., 715 F.2d 369 (7th Cir. 1983)	5
Farmer v. Carpenters, 430 U.S. 290 (1977)	1-7
Hyles v. Mensing, 849 F.2d 1213 (9th Cir. 1988)	6
Keehr v. Consolidated Freightways, 825 F.2d 133 (7th Cir. 1987)	7
Moore v. General Motors Corp., 739 F.2d 311 (8th Cir. 1984)	7
Motor Coach Employees v. Lockridge, 403 U.S. 274 (1971)	
Operating Engineers v. Jones, 460 U.S. 669 (1982)	5, 6
Paige v. Henry Kaiser Construction Company, 826 F.2d 857 (9th Cir. 1987)	7
San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236 (1959)	5
Screen Extras Guild, Inc. v. Superior Court, 209 Cal.App.3d 378, 257 Cal.Rptr. 242 (1989)	7
Sears Roebuck & Co. v. San Diego County District Council of Carpenters, 436 U.S. 180 (1978)	5, 6
Survival Systems v. U.S. District Court, 825 F.2d 1416 (9th Cir. 1987)	7
Tellez v. Pacific Gas and Elec. Co., Inc., 817 F.2d 536 (9th Cir. 1987)	6

Statutes

Cal. Rule of Court 977(a)	7
National Labor Relations Act, 29 U.S.C. Sections 157, 158 Section 301 (29 U.S.C. § 185)	6

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I

STATEMENT OF THE CASE

The petition for certiorari chooses to ignore the finding of the trial court and the conclusion of the California Court of Appeal that this is a "garden variety" case claiming union hiring hall discrimination, and as such is preempted by federal law. Instead, without ever saying so directly, petitioners set out to persuade this Court that *every* intentional infliction of emotional distress claim filed in state court is exempt from federal preemption requirements. However, as the Court of Appeal recognized, petitioners' argument ignores plain and obvious language in *Farmer v. Carpenters*, 430 U.S. 290 (1977). Because the only question properly presented by the petition for certiorari is whether *Farmer* applies to the peculiar facts of this case, the petition presents no

new, novel, or even challenging issue, and it should be summarily denied.

The crux of petitioners' claim for intentional infliction of emotional distress was that respondents unfairly denied them first priority for work referrals under the union hiring hall system, resulting in time off of work and lost wages. (App. 34, 41-42) Both petitioners had been union plumbers for many years when they abandoned the union, quit paying union dues and established a competing non-union contracting business. (App. 35) After their business went bankrupt, petitioners sought readmission to the union and placement upon "Book One," which would have given them highest priority for job referrals under the hiring hall system. (App. 36) According to petitioners, however, respondents wanted to "make them pay" for having run a non-union business and did so by: (1) delaying petitioners' readmission to the union for about two weeks; and (2) upon readmission, requiring petitioners to sign "Book Four," which gave petitioners the lowest priority for job referrals. (App. 36) There is no dispute that under the union's hiring hall rules, petitioners were qualified only for Book Four. (App. 41)

Petitioners filed complaints with the NLRB anyway. (Trial Exhs. 20, 21) The Board accepted jurisdiction over the complaints, but then dismissed the complaints after petitioners refused to cooperate with the Board's investigation. (RT 189:9-28; Trial Exhs. 22, 23) The reason why petitioners abandoned their complaints with the NLRB became apparent because petitioners also sued respondents in a California Superior Court, seeking recovery of lost wages and the tort damages for intentional infliction of emotional distress that were unavailable before the NLRB.[1] (App. 33) At trial, petitioners conceded that their

[1] The case was removed to federal court but later remanded after petitioners voluntarily dismissed their claims which had supported federal jurisdiction. (App. 33) In this regard, petitioners do not accurately characterize the federal district court's unpublished order concluding that they had pled a cause of action under *Farmer*. (App. 59-62) That order was based solely on the pleadings, so that the federal court accepted as true petitioners' allegations that respondents had

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placement on Book Four was proper under the union hiring rules, but nevertheless claimed that such placement constituted "abusive employment discrimination" because several similarly situated members of the union local were allowed to sign Book One. (App. 41; RT 549, 555, 606-608) No public ridicule, abusive language or physical violence accompanied this alleged discrimination, and petitioners have never claimed otherwise. (App. 41-43)

Consequently, after the jury awarded petitioners compensatory damages (including an amount for lost wages) and punitive damages, the trial court ordered a new trial on all issues because the evidence merely showed "garden variety" discrimination. (App. 64-65) The trial court explained that petitioners had failed to prove the extreme and outrageous conduct necessary to support their state law tort claim and that any employment discrimination carried out against them was not accomplished in a "particularly abusive manner" as required by *Farmer v. Carpenters, supra,* 430 U.S. at 305. (App. 64-65)

The California Court of Appeal unanimously agreed with the trial court's assessment of the evidence and further held that a retrial would exceed the trial court's subject matter jurisdiction because the core of petitioners' lawsuit was a hiring hall dispute subject to the primary jurisdiction of the NLRB.[2] (App. 38-44) The Court of Appeal accordingly directed entry of judgment for

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subjected petitioners to physical threats and intimidation. (App. 59-62) As both the California trial court and Court of Appeal later concluded, however, petitioners failed to prove those allegations. (App. 42, 64-65) Instead, petitioners' evidence of harassment and threats of violence at the workplace implicated only rank-and-file members of the union, whose acts were not authorized or ratified by respondents. (App. 42, 64-65)

[2] For these reasons, petitioners' claim [Petition at 5, 16] that their evidence constituted outrageous conduct under California law distorts the record. The trial court expressly found that petitioners' proof did not meet that standard [App. at 64-65], and the Court of Appeal in its opinion after rehearing—the only extant or controlling decision here—did not address the sufficiency of petitioners' evidence under state law. (*Compare* App. at 38 *with* App. at 51)

respondents and the California Supreme Court, also acting unanimously, declined to review that decision. (App. 31, 44)

II

THE PETITION SHOULD BE DENIED BECAUSE IT FAILS TO PRESENT ANY ISSUE DESERVING THIS COURT'S ATTENTION

Petitioners claim that this Court must review the opinion of the California Court of Appeal because the opinion misconstrued the *Farmer* exception to *Garmon* preemption and because, according to petitioners, the lower state and federal courts are "confused" about the scope of federal preemption of labor disputes. However, it is the petitioners, not the Court of Appeal, who have incorrectly applied *Farmer*, and their claim of "confusion" is an artifice designed to induce this Court to grant the petition.

A. This Case Is Squarely Within The Rule Of Farmer v. Carpenters And Other Cases Decided By This Court And Thus Presents No Cert.-Worthy Issue

This Court has long recognized that reliance upon the NLRB's expertise in labor matters is particularly important in the context of the operation of a union hiring hall. *Association of Journeymen v. Borden*, 373 U.S. 690, 695-696 (1963). A state tort action based upon a union hiring hall controversy is therefore preempted under federal law unless the tort is unrelated to employment discrimination or is "a function of the particularly abusive manner in which the discrimination is accomplished or threatened rather than a function of the actual or threatened discrimination itself." *Farmer v. Carpenters, supra*, 430 U.S. at 305. *Farmer* also admonishes that discrimination "cannot itself form the underlying 'outrageous' conduct on which the state court tort action is based; to hold otherwise would undermine the preemption principle." *Id.*

In the teeth of this language, petitioners contend *Farmer* requires "a California Court [to] determine whether a cause of action exists for intentional infliction of emotional distress," and if it does to find there is no preemption. (Petition at 14) The effect of such a rule would be to render *every* claim for intentional

infliction of emotional distress immune from federal preemption, a result directly at odds with the teaching not only of *Farmer* but of many other opinions by this Court. *See, e.g., Operating Engineers v. Jones*, 460 U.S. 669, 680-682 (1982); *Motor Coach Employees v. Lockridge*, 403 U.S. 274, 295-296 (1971); *Association of Journeymen v. Borden, supra*, 373 U.S. at 697-698; *San Diego Bldg. Trades Council v. Garmon, supra*, 395 U.S. at 264.

Equally meritless is petitioners' assertion that respondents' conduct was immune from preemption because they had "abused their position" by preventing petitioners from working. Of course, whether there was an "abuse of position" in this or a similar case will necessarily depend upon the content of hiring hall rules and whether the union officials fairly applied these rules in a particular case. *Cf., Operating Engineers v. Jones, supra*, 460 U.S. at 682; *Choate v. Louisville & Nashville R. Co.*, 715 F.2d 369, 370 (7th Cir. 1983). But these are the very disputes that federal labor law preempts. Indeed, in this case petitioners' "abuse of position" theory rested on the premise that they were entitled to lost wages and tort damages because respondents had properly—but somehow "outrageously"—assigned them to Book Four. In short, a tort claim based upon an "abuse of position" theory would invariably present the same issues that are squarely within the primary jurisdiction of the NLRB and would therefore be preempted. *Farmer v. Carpenters, supra*, 430 U.S. at 305; *Association of Journeymen v. Borden, supra*, 373 U.S. at 695-697.

Contrary to petitioners' contention [Petition at 22-25], the Court of Appeal's decision does not conflict with *Sears Roebuck & Co. v. San Diego County District Council of Carpenters*, 436 U.S. 180 (1978), or *Belknap, Inc. v. Hale*, 436 U.S. 491 (1983), since in both those cases the issues involved were peripheral to the NLRB's primary jurisdiction. In *Sears*, the state court had the jurisdiction to issue an injunction against picketing which constituted a continuing trespass under state law. Because only the location of the picketing was involved, the state court did not have to address the legality of the picketing, the only issue that would have implicated national labor policy. Preemption was also unnecessary because under the facts of that case, the aggrieved party did not have a "reasonable opportunity" to have the dispute

resolved by the NLRB. *Sears Roebuck & Co. v. San Diego County District Council of Carpenters, supra,* 436 U.S. at 198, 201-202. Similarly, *Belknap* only involved contract and fraud claims by discharged employees who had been hired to replace striking workers. That dispute, as the Court held, depended entirely upon state law and would not require an examination of actions taken by the employer to settle the strike, which was the only issue regulated by federal law. *Belknap, Inc. v. Hale, supra,* 436 U.S. at 500-501.

Here, conversely, petitioners' tort claims cannot legitimately be characterized as a peripheral concern to national labor policy as petitioners themselves recognized when they invoked the jurisdiciton of the NLRB.[3] After petitioners chose to abandon that forum, however, they then asked the state court to resolve precisely the same issue they had presented to the NLRB—whether they were entitled to damages for the allegedly discriminatory operation of the hiring hall. Since the federal and state claims were "the same in a fundamental respect," preemption is required for that reason. *Operating Engineers v. Jones, supra,* 460 U.S. at 682. *See also, Farmer v. Carpenters, supra,* 430 U.S. at 305; *Association of Journeymen v. Borden, supra,* 373 U.S. at 697-698.

B. The Court Of Appeal's Disposition Of This Case Does Not Create Any Potential For "Confusion"

Petitioners' claim of "confusion" among the lower courts [Petition at 25-29] is not accurate because the claim rests upon cases that do not involve *Garmon* preemption.[4] *Tellez v. Pacific Gas and Elec. Co., Inc.,* 817 F.2d 536 (9th Cir. 1987) (Section 301

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[3] Petitioners' claim [Petition at 22] that their tort claim was not preempted because the NLRB would not have awarded tort damages has been expressly rejected by this Court in *Operating Engineers v. Jones, supra,* 460 U.S. at 684.

[4] The Ninth Circuit formerly applied *Farmer* by analogy in Section 301 (29 U.S.C. § 185) preemption cases but no longer does so in light of the Court's decision in *Allis-Chalmers Corp. v. Lueck,* 471 U.S. 202 (1985). *E.g., Hyles v. Mensing,* 849 F.2d 1213, 1216-1217 (9th Cir. 1988). Section 301 preemption is not involved in this case, however, and

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preemption); *Paige v. Henry Kaiser Construction Company*, 826 F.2d 857 (9th Cir. 1987) (same); *Moore v. General Motors Corp.*, 739 F.2d 311 (8th Cir. 1984) (same); *Abreu v. Svenhard's Swedish Bakery*, 208 Cal.App.3d 1446, 257 Cal.Rptr. 26 (1989) (same); *Screen Extras Guild, Inc. v. Superior Court*, 209 Cal.App.3d 378, 257 Cal.Rptr. 242 (1989) (preemption under the Labor Management Reporting And Disclosure Act).[5] The issue under Section 301 preemption is whether the state law claim requires interpretation of the terms of the particular collective bargaining agreement involved. *Allis-Chalmers Corp. v. Lueck, supra*, 471 U.S. at 202. Here, of course, there was no issue about interpretation of a collective bargaining agreement because petitioners' claim directly implicated the NLRB's primary jurisdiction to regulate union hiring hall practices.

The only cases cited that directly involve *Garmon* preemption do not show confusion at all but rather exemplify when, under *Farmer*, preemption is unnecessary to protect the NLRB's primary jurisdiction. *Survival Systems v. U.S. District Court*, 825 F.2d 1416 (9th Cir. 1987) (plaintiff held against her will and requested to perform lewd sexual acts); *Keehr v. Consolidated Freightways*, 825 F.2d 133 (7th Cir. 1987) (the defendant's foreman deliberately made scandalous statements about the plaintiff as part of a company policy to cause the termination of some employees). Petitioners accordingly have not shown, and cannot show, any conflict between those decisions and the Court of Appeal's opinion here.

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the petition accordingly does not raise the issue of whether *Farmer* should be applied in a Section 301 case.

[5] Petitioners also claim that the confusion of the lower courts is demonstrated by *Alpha Beta, Inc. v. Superior Court*, 244 Cal.Rptr. 414 (1988). That decision, however, cannot create confusion or conflict because the California Supreme Court ordered that it not be published in the California Official Reports and it therefore cannot be cited as precedent. Cal. Rule of Court 977(a). It is highly improper for petitioners to even cite the case, much less include it in their appendix. *Alpha Beta*, moreover, is in fact a Section 301 case and thus has no relevance here. (App. 82-85)

Thus, both premises of the petition are unsupportable, and there is no issue in this case which merits the attention of this Court.

III

CONCLUSION

There is nothing novel or important, let alone erroneous, about the Court of Appeal's opinion here, and the petition should be denied.

DATED: June 20, 1989.

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